Chicago-Kent Law Review

Volume 35 | Issue 2 Article 8

April 1957

Torts - Invasion of Personal Safety, Comfort, or Privacy - Whether Public Exploitation of a Debtor's Personal Affairs by a Collection Agent Is An Invasion of the Debtor's Right to Privacy

D. H. Niederer

seems to be one which demands the attention and voice of the legislature for its ultimate determination. While the holding in the instant case seems at first blush extremely inconsistent with the original attitude in Illinois toward the validity of conditional sales contracts,[24] one must admit that the present status of the law justifies such a holding. Unless the court is willing to realize the position and limited legal understanding of the average buyer under such a contract, thus necessitating the public policy argument, it can come to no other conclusion than that of enforcing the contract in its entirety. The law, as a general proposition, says that courts cannot rewrite contracts into which parties have seen fit to enter and that a man is bound by his contract. When such principles are backed up by clauses such as that in the Illinois Sales Act,[25] the courts are left no alternative other than some aspect of public policy. If the public are to be given adequate protection in their commercial dealings, such protection must come from the law making body. Such a step in the right direction has been taken in the Uniform Commercial Code,[26] which to date has had but limited acceptance.[27] It is not the purpose of this note to decide whether this provision or some other means is the answer to a growing problem but rather to point out the need of some definite determination of the issues involved. In this light, it might well be asked, is there a place in our social order for the seller who, in his dealings with the public, needs an accompanying waiver to carry his luggage?

C. F. ANDERSON

TORTS—INVASION OF PERSONAL SAFETY, COMFORT, OR PRIVACY—WHETHER PUBLIC EXPLOITATION OF A DEBTOR'S PERSONAL AFFAIRS BY A COLLECTION AGENT IS AN INVASION OF THE DEBTOR'S RIGHT OF PRIVACY—A significant problem concerning a debtor's right of privacy came before the Supreme Court of Ohio for the first time in the case of *Housh* v. *Peth*.[1]

[24] See Gilbert v. Nat. Cash Register Co., 176 Ill. 288, 52 N. E. 22 (1898); and Brundage v. Camp, 21 Ill. 329 (1859). Both were overruled in Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925). The original attitude of the courts in Illinois was that a secret reservation of title to personal property amounted to a constructive fraud and was invalid against a bona fide purchaser or subsequent incumbrancer for value.

[25] Ill. Rev. Stat. 1955, Vol. 2, Ch. 121½, § 71.

[26] Uniform Commercial Code, Part 2, § 9—206, which reads in part as follows: "An agreement by a buyer of consumer goods as part of the contract for sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person."

[27] Kohn, "The Present Status of the Uniform Commercial Code," 45 Ill. B. J. 224 (1956). Although the code was immediately referred to legislative committees in a number of states, it has since become law only in Pennsylvania.

[1] 165 Ohio St. 35, 133 N. E. (2d) 340 (1956), affirming—Ohio—, 135 N. E. (2d) 440 (1955), noted in 7 Western Res. L. Rev. 452 and 2 Wayne L. Rev. 240. Hart, J. wrote a dissenting opinion, concurred in by Stewart and Taft, J. J.

The plaintiff debtor alleged that the defendant, a collection agent, deliberately and maliciously, by a systematic scheme, harassed, annoyed, and tormented the plaintiff, causing the plaintiff nervousness, worry, humiliation, mental anguish, and loss of sleep. The defendant, in his efforts to collect the debt owed by the plaintiff, made numerous telephone calls, some to the plaintiff's place of employment, once calling three times within a fifteen minute period, with the result that the plaintiff's employer threatened to discharge the plaintiff; others were made to the plaintiff's superiors and landlord, informing them of the plaintiff's debt. Lastly, the plaintiff complained that the defendant had made as many as eight or nine calls per day to the plaintiff at her residence, sometimes as late as 11:45 p.m. The trial court entered judgment on the verdict for the plaintiff. The Court of Appeals affirmed the judgment, and by allowance of the defendant's motion to certify the record, the case was brought before the Supreme Court of Ohio. In a four to three decision, the highest Ohio tribunal held that the right of privacy exists in Ohio. While recognizing the creditor's right to take reasonable action to pursue his debtor and persuade payment, the court firmly declared that use of a systematic scheme to harass, torment, and coerce the debtor to pay is an invasion of this right.

In the last decade when business has been flourishing at an unprecedented high, spending has also reached its highest level in American history.[2] Much of the spending, however, has been done with borrowed money on the so-called "pay as you use plan." In order to cope with the problems of collection, credit agencies have resorted to various methods and tactics to put moral or legal pressure on the debtor to make payment.[3] Some of the more aggressive creditors have resorted to what might be considered unorthodox methods of persuading the debtor to make payments which ultimately led them to tort liability for libel and slander,[4]

2 Changing Times, The Kiplinger Magazine, The Kiplinger Washington Agency, Inc., Washington D. C., Nov. 1956, Vol. 10, No. 11, Page 41.

3 58 Comm. L. J. 5.

4 Holtz v. National Furniture Co., 57 F. (2d) 446 (1932) (letter to buyer threatening legal action); Davis v. General Finance and Thrift Corporation, 80 Ga. App. 708, 57 S. E. (2d) 225 (1950) (telegram to buyer threatening legal action if payment is not forthcoming immediately); Gault v. Babbitt, 1 Ill. App. 130 (1878) (sign posted on tree advertising debt); Zier v. Hoflin, 33 Minn. 66, 21 N. W. 862 (1885) (sign in window reading: "Wanted, E. B. Z., M.D., to pay drug bill"); Keating v. Conviser, 246 N. Y. 632, 159 N. E. 680 (1927) (letter asking employer to speak to employee about paying debt); Burton v. O'Neil, 6 Tex. Civ. App. 613, 25 S. W. 1013 (1894) (letter to debtor threatening to place debtor's name on list of persons unworthy of credit); Muetzer v. Tuteur, 77 Wis. 236, 46 N. W. 123 (1890) (debtor's name appearing on envelope marked "for collecting bad debts"). Also see 3 A. L. R. 1596, 48 A. L. R. 573, 55 A. L. R. 971, 106 A. L. R. 1453.

intentionally inflicted mental anguish,[5] malicious prosecution,[6] assault,[7] or invasion of the right of privacy.[8]

With the increase in the number of states recognizing the right of privacy,[9] debtors are becoming better equipped to take equitable action[10] to prevent the creditor from using unreasonable means to coerce payment, or legal action[11] to recover damages occasioned by the creditor who has used unreasonable means in his efforts to persuade the debtor to pay. What are unreasonable means is a question of fact which must be determined in each individual case. Tactics and methods used to persuade payment will be considered unreasonable where the communication impugns the debtor's honesty,[12] holds the debtor up to public ridicule or

5 Curnett v. Wolf, 244 Iowa 683, 57 N. W. (2d) 915 (1953); Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932); Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P. (2d) 808 (1953); Quina v. Roberts, 16 So. (2d) 558 (La. App., 1944). LaSalle Extension University v. Fogarty, 126 Neb. 457, 253 N. W. 424 (1934); Gadbury v. Bleitz, 133 Wash. 28, 233 P. 299 (1925).

6 Gore v. Gorman's Incorporated, 143 F. Supp. 9 (1956), presents a typical situation where a debtor sued his creditor who instituted a garnishment action in an attempt to collect a debt discharged in bankruptcy.

7 This situation generally arises where an agent of the collection agency commits the assault. See 58 Comm. L. J. 58 and 31 North Dakota L. Rev. 277 for discussion of assault by an agent.

8 Clarke v. Associated Retail Credit Men, 105 F. (2d) 62 (1939); McKinzie v. Huckaby, 112 F. Supp. 642 (1953); Herman Saks & Sons v. Ivey, 26 Ala. App. 240, 157 So. 265 (1934); Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948); Lucas v. Moskins Store, Inc.,—Ky.—, 262 S. W. (2d) 679 (1953); Pangello v. Murphy,—Ky.—, 243 S. W. (2d) 496 (1951); Voneye v. Turner,—Ky.—, 240 S. W. (2d) 588 (1951); Trammell v. Citizen News Co., Inc., 285 Ky. 529, 148 S. W. (2d) 708 (1941); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Thompson v. Alberg & Berman Inc., 181 Ky. 487, 205 S. W. 558 (1918); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 A. 239 (1916); Judevine v. Benzies-Montanye Fuel and Warehouse Co., 222 Wis. 512, 269 N. W. 295 (1936).

9 Alabama, Arizona, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nevada, New Jersey, North Carolina, Oregon, South Carolina, District of Columbia, and now Ohio recognize the right of privacy, and the Massachusetts courts have, by way of dicta, indicated that it will be accepted there. Such actions have been expressly rejected in Rhode Island, Texas, and Wisconsin. New York, Utah, and Virginia permit actions for the invasion of the right of privacy by statute, but limit its scope to cases where a picture, portrait, or name has been used for advertising purposes without permission.

10 No case in point has been found wherein a debtor sought to use the equitable power of the court. However, see Mavity v. Tyndall, 224 Ind. 364, 66 N. E. (2d) 755 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 166; and Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948).

11 See cases listed under footnote 8, ante.

12 Voneye v. Turner,—Ky.—, 240 S. W. (2d) 588 (1951).

scorn,[13] subjects the debtor to unwarranted publicity,[14] or subjects the debtor to mental or physical distress.[15]

There are several reasons why the right of privacy has become the preferred remedy for debtors suing their creditors for using unreasonable means to collect debts. First, in contrast to the libel and slander actions,[16] truth is no defense to an action for the invasion of privacy.[17] It has been expressly held in the case of *Barber* v. *Time*[18] that right of privacy actions are reserved for cases where the statements complained of are true and, if the statements are false, the action must be brought for libel. So, it appears that the tort invented by Warren and Brandeis[19] is another restriction on our freedom of speech. The limit to which the creditor's speech is restricted is basically a problem of balancing the harm which will accrue to the creditor by restraining his speech, and the harm which will be suffered by the debtor if the creditor's speech is not restrained. In those instances where the harm suffered by the debtor overbalances the harm that would have been suffered by the creditor had his speech been restricted, the creditor is liable.[20]

A second reason for the debtor to prefer the right of privacy action is that malice is not a necessary element to the maintenance of the action.[21] This action, as described by Warren and Brandeis, awards the injured party damages for mental anguish, public ridicule, loss of reputation, or physical deterioration without a showing of malice. This, however, does

[13] Trammell v. Citizen News Co., 285 Ky. 529, 148 S. W. (2d) 708 (1941); Thompson v. Alberg & Berman, 181 Ky. 487, 205 S. W. 558 (1918).

[14] Herman Saks & Sons, 26 Ala. App. 240, 157 So. 265 (1934); Trammell v. Citizen News Co., 285 Ky. 529, 148 S. W. (2d) 708 (1941); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340 (1956).

[15] Clarke v. Associated Retail Credit Men, 105 F. (2d) 62 (1939); Patapsco Loan Co. v. Hobbs, 129 Md. 9, 98 A. 239 (1916); Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340 (1956).

[16] In some jurisdictions truth is a defense to libel and slander only when published with good motives and justifiable ends. For example, see Ill. Const. 1870, Art. II, § 4.

[17] Voneye v. Turner,— Ky.—, 240 S. W. (2d) 588 (1951); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Barber v. Time, 348 Mo. 1199, 159 S. W. (2d) 291 (1942); Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340 (1956).

[18] 348 Mo. 1199, 159 S. W. (2d) 291 (1942).

[19] Warren and Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890). This article has generally been credited with the unique distinction of having initiated and theoretically outlined a new field of jurisprudence. See 12 Col. L. Rev. 193.

[20] Mavity v. Tyndall, 224 Ind. 364, 66 N. E. (2d) 755 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 166. Also See 4 Harv. L. Rev. 193 and 39 Mich. L. Rev. 526.

[21] Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); Barber v. Time, 348 Mo. 1199, 159 S. W. (2d) 291 (1942).

not preclude the plaintiff from maintaining the action where malice is present, and in those instances where the debtor can prove malice, the court may award punitive damages.[22]

A third advantage in favor of the debtor is that no special damages need be shown.[23] The courts have consistently held that substantial damages may be recovered even though the only damages suffered result from mental anguish.[24] Warren and Brandeis required special damages only when the action was predicated upon the invasion of privacy by oral publication.[25] While judicial authority on this point is sparse, it may be noted that the Court of Appeals of Ohio apparently agreed when it said: "Special damages have been shown which meet the requirement of that line of cases which holds that when the invasion of the right of privacy is caused by an oral communication, special damages must be shown."[26]

Despite the above enumerated advantages of this action, the debtor, even today, does not always have smooth sailing. Such actions have been successfully defended on the ground that there was no publication to a third person,[27] the matter published was one of public interest,[28] the communication was privileged,[29] the debtor gave his consent to the publication,[30] the debtor is not entitled to bring the action,[31] the cause of action

22 Barber v. Time, 348 Mo. 1199, 159 S. W. (2d) 291 (1942); Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340 (1956).

23 Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. (2d) 133 (1945).

24 For example see Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N. E. (2d) 742 (1952), noted in 31 CHICAGO-KENT LAW REVIEW 261, 41 Ill. B. J. 120, and 1952 Ill. L. Forum 459; and Housh v. Peth, 165 Ohio St. 35, 133 N. E. (2d) 340 (1956). For a discussion on damages, see 77 C. J. S., Right of Privacy, § 7, p. 416.

25 4 Harv. L. Rev. 193 at 217.

26 Housh v. Peth,—Ohio App.—, 135 N. E. (2d) 440 at 449. The line of cases referred to are Pangallo v. Murphy,—Ky.—, 243 S. W. (2d) 496 (1951); Trammell v. Citizen News Co., 285 Ky. 529, 148 S. W. (2d) 708 (1941); Brents v. Morgan, 221 Ky. 765, 299 S. W. 967 (1927); and Martin v. F. I. Y. Theatre Co., 26 Ohio Law Abst. 67, 1 Ohio Supp. 19 (1938) which reads, at p. 22: "It cannot be violated under any circumstances by the spoken word."

27 McKinzie v. Huckaby, 112 F. Supp. 642 (1953).

28 Voneye v. Turner,—Ky.—, 240 S. W. (2d) 588 (1951); Smith v. Suratt, 7 Alaska 416 (1946).

29 Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d) 789 (1948); Voneye v. Turner,—Ky.—, 240 S. W. (2d) 679 (1913). For a discussion on privileged communication between a creditor and the employer of debtor, see 26 Rocky Mt. L. Rev. 347 and 22 Wash. L. Rev. 229.

30 While this problem has not arisen in the debtor-creditor cases, see Continental Optical Co. v. Reed,—Ind.—, 86 N. E. (2d) 306 (1949), wherein the defense of consent was successful in an action for the invasion of privacy. Martin. J. dissented as to the amount of damages.

31 For example, a corporation does not enjoy the right of privacy: Vassar College v. Loose-Wiles Biscuit Co., 197 F. 982 (1912); nor does statutory right of privacy extend to a partnership: Rosenwasser v. Ogoglia, 158 N. Y. S. 56 (1916).

has been extinguished,[32] or the means used to persuade payment were reasonable.[33]

It would seem that the right of privacy is going to take a prominent place in the debtor-creditor relationship. Actions for its invasion will reward the debtor with all the remedies available for redress of libel, slander or intentionally inflicted mental anguish while not requiring the rigid tort allegations of untruth, malice, or special damages. How far the courts will extend the protection of the right of privacy is pure speculation, but in light of the recent Ohio decision, it behooves creditors to review their debt collection practices or otherwise they will face a disgruntled debtor armed with a new and highly potent weapon—the right of privacy.

D. H. NIEDERER

[32] The right of privacy is a personal action and ceases to exist upon the death of the person entitled to bring the action. Schulyer v. Curtis, 147 N. Y. 434, 42 N. E. 22 (1896). See Nizer, "The Right of Privacy, A Half Century's Developments," 39 Mich. L. Rev. 526 at 553 (1941).

[33] Patton v. Jacobs, 118 Ind. App. 358, 78 N. E. (2d), 789 (1948); Lucas v. Moskins Stores,—Ky.—, 262 S. W. (2d) 679 (1951); Voneye v. Turner,—Ky.—, 240 S. W. (2d) 588 (1951).